

**KENTUCKY PERSONNEL BOARD**  
**MINUTES OF JANUARY 12, 2018**

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1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chair Crall on January 12, 2018, at approximately 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky.

Board Personnel Present:

Brian J. Crall, Chair  
Mark O. Haines, Vice Chair  
Beverly H. Griffith, Member  
William J. Byrley, Member  
Heather C. Wagers, Member  
Catherine J. Monteiro, Member  
Tanya R. Lawrence, Member  
Mark A. Sipek, Executive Director and Secretary  
Stafford Easterling, General Counsel  
Cynthia Perkins, Administrative Section Supervisor  
Gwen McDonald, Administrative Specialist

2. **READING OF THE MINUTES OF THE REGULAR MEETING HELD DECEMBER 11, 2017.**

The minutes of the last Board meeting had been previously circulated among the members. Chair Crall asked for additions or corrections. Mr. Byrley moved to approve the minutes as submitted. Mr. Haines seconded and the motion carried 6-0. The Board members signed the minutes.

(Chair Crall does not vote, unless noted.)

3. **EXECUTIVE DIRECTOR'S REPORT**

Mr. Sipek advised that staff have been busy moving to the Board's new location.

Technical changes will be made to the regulations and on the appeal form to update the Board's new address.

Mr. Sipek advised that Mr. Haines was reappointed to serve the Personnel Board by Governor Bevin [term expiring January 1, 2022]. Mr. Easterling, General Counsel, gave the oath of office prior to the Board meeting.

#### 4. **PERSONNEL CABINET'S REPORT**

Ms. LaDonna Koebel, Chief of Staff, presented the Personnel Cabinet's report.

Ms. Koebel stated that a bogus message was sent out to state employees that state offices were closed January 12, 2018, due to weather. To ensure employees get the appropriate messages, she stated that the Personnel Cabinet has a mobile app that employees can download on their phones.

5. Petition Pursuant to KRS 18A.175  
Energy and Environment Cabinet, Department for Natural Resources  
--Remove the position of Conservation Director, Division of Conservation, from the classified service and replace it with an unclassified Division Director.

Present for the Energy and Environment Cabinet (EEC) were the Hon. Leesa Moorman and Nina Hockensmith, Division Director, Office of Administrative Services.

Ms. Moorman stated that the Conservation Director is a policy-making position and should be a non-merit position. In 1962, this position was placed in the merit system. In 1992, a former Personnel Director, Division of Classification and Compensation, advised that designating the position of Conservation Director as classified was erroneous. Therefore, EEC is now requesting approval to make the correction.

Ms. Wagers moved to approve that the merit Conservation Director position be replaced with an unclassified Division Director. Ms. Monteiro seconded and the motion carried 6-0.

6. AG Hearing Officers  
**Deferred from January Board**

The Hon. Travis Mayo and the Hon. Gordon Slone were present to discuss using the Attorney General's Hearing Officers for the Personnel Board.

Mr. Mayo stated that, after a meeting with Mr. Sipek and Mr. Easterling, it was requested an AG representative appear before the Board. Agencies that have administrative hearings are surveyed and are to provide written waivers to the Attorney General's office every two years. Neither the Board nor the AG's office could locate a written waiver, but had an arrangement since 1999 allowing the Board to contract out hearing officers. The AG has now determined that they can provide hearing officers to the Board. Specifically, the AG's office can provide hearing officers: 1) for a portion of the hearings and 2) at the same rate currently paid to the Board's

hearing officers. It was not the intention of the Attorney General's office to disrupt the Board's routine. The Personnel Board will continue to handle all pre-hearing conferences.

Mr. Crall questioned the AG's motive after twenty years of the Board operating without the Attorney General's office. Mr. Mayo stated that the AG's office was complying with KRS Chapter 13B to provide hearing officers. Mr. Crall asked how the AG's office will ensure political pursuits are not followed. Mr. Mayo stated that the AG's office will follow the law under KRS 18A and that they will remain neutral decision makers.

In response to Ms. Wagers' and Ms. Griffith's concerns about how the Board would address problems with an AG hearing officer, Mr. Mayo stated that any issues with an AG hearing officer would be taken seriously. Mr. Slone added that the designated Appointing Authority would conduct an investigation and a decision would be made based on the investigative report.

Mr. Mayo stated the AG's office could provide a Memorandum of Agreement (MOA) prior to the Board's next meeting. Mr. Crall asked that the AG give all due consideration to a July 1, 2018, start date in the MOA.

## 7. ORAL ARGUMENTS

- A. ~~Thaddeous Price v. Education and Workforce Development Cabinet~~  
~~(Appellant's Request)~~ **Moved to February Board**
- B. Lisa Craigmyle v. Justice and Public Safety Cabinet/Corrections

Present for oral arguments were counsel for Appellant, the Hon. Thomas Schulz, and counsel for Appellee, the Hon. Alex Mattingly. After presenting oral arguments, the parties answered questions from the Board, with Ms. Wagers abstaining.

- C. Jamie Howe-Thornton v. Cabinet for Health and Family Services

Present for oral arguments were the Appellant, Jamie Howe-Thornton, and counsel for Appellee, the Hon. Mona Womack. After presenting oral arguments, the parties answered questions from the Board.

## 8. **CLOSED SESSION**

Ms. Wagers moved that the Board go into Executive Session for the purposes of discussing complaints and deliberations regarding individual adjudications. Ms. Lawrence seconded. Chair Crall stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. [Pursuant to KRS 61.810(1)(j), the Kentucky Open Meetings Act, the Board retired into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action was as follows, because there was discussion of deliberations regarding individual adjudications as listed on the Board's Agenda.] The motion carried 6-0. (11:10 a.m.)

Ms. Wagers moved to return to open session. Ms. Monteiro seconded and the motion passed by acclamation. (12:20 p.m.)

## 9. **CASES TO BE DECIDED**

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments, where applicable.

### A. **Chase Spaw v. Transportation Cabinet (2017-047)** **Deferred from January Board**

Ms. Lawrence moved to defer this matter to the next Board meeting. Ms. Griffith seconded and the motion carried 5-1, with Mr. Haines opposing.

### B. **Marvin Thomas v. Transportation Cabinet and Frank Kincaid (2017-051)** **Deferred from December Board**

Ms. Griffith, having considered Appellee's exceptions, Appellant's response, and oral arguments, moved to accept the Final Order, as attached to the minutes, dismissing the appeal. Ms. Wagers seconded and the motion carried 6-0.

### C. **Lisa Craigmyle v. Justice and Public Safety Cabinet/Corrections (2017-065)**

Mr. Haines, having considered the Appellee's exceptions, Appellant's response and oral arguments, moved to accept the recommended order sustaining the appeal to the extent therein. Ms. Monteiro seconded and the motion carried 5-0, with Ms. Wagers recusing.

D. **Brittany Ross, et al. v. Justice and Public Safety Cabinet/State Police  
(2015-092, et al.) (9 appeals)**

Mr. Byrley, having considered the Appellant's exceptions and Appellee's response, moved to accept the recommended order dismissing the appeals. Ms. Monteiro seconded and the motion carried 5-0, with Ms. Wagers recusing.

E. **Ray Sandy v. Justice and Public Safety Cabinet/Corrections  
(2017-006 and 2017-057)**

Ms. Monteiro moved to accept the recommended order dismissing the appeal. Ms. Lawrence seconded and the motion carried 5-0, with Ms. Wagers recusing.

F. **Francisco Garza v. Justice and Public Safety Cabinet/Juvenile Justice  
(2017-034)**

Ms. Griffith moved to accept the recommended order dismissing the appeal. Ms. Monteiro seconded and the motion carried 5-0, with Ms. Wagers recusing.

G. **Sherri Chappell v. Transportation Cabinet and Personnel Cabinet (2016-263)**

Ms. Griffith, having considered the Appellant's exceptions and Appellee Personnel Cabinet's response, moved to accept the recommended order dismissing the appeal. Ms. Wagers seconded and the motion carried 5-0, with Ms. Lawrence recusing.

H. ~~**Thaddeous Price v. Education and Workforce Development Cabinet (2015-296  
and 2016-043) (Reclassification, ethnic origin, sex & political discrimination —  
Dismissed)**~~  
~~—Appellant's Exceptions and Request for Oral Argument~~  
~~—Appellee's Response~~ **Moved to February Board**

I. **Jamie Howe-Thornton v. Cabinet for Health and Family Services (2017-037)**

Mr. Byrley, having considered Appellant's exceptions and oral arguments, moved to accept the recommended order dismissing the appeal. Mr. Haines seconded and the motion carried 6-0.

[Executive Director's Note: The Appellee filed a timely response to exceptions, which inadvertently was not provided to the Board. This omission is reflected in the Final Order.]

J. **David Wilbers v. Office of Attorney General (2017-007)**

Ms. Monteiro, having considered Appellant's exceptions and Appellee's response, moved to accept recommended order dismissing the appeal. Ms. Lawrence seconded and the motion carried 6-0.

K. **Jody Blackburn v. Transportation Cabinet (2017-056)**

Mr. Haines moved to accept the recommended order dismissing the appeal. Ms. Griffith seconded and the motion carried 6-0.

L. **Angela Wilson v. Tourism, Arts and Heritage Cabinet (2017-022)**

Ms. Griffith moved to accept the recommended order dismissing the appeal. Mr. Haines seconded and the motion carried 6-0.

**Show Cause Orders – No Response Filed – Appeals Dismissed**

Ms. Griffith moved to accept the recommended orders *en bloc* dismissing the appeals for failure to timely prosecute the appeals. Ms. Lawrence seconded and the motion carried 6-0.

M. Michael Cummins v. Transportation Cabinet (2017-128)

N. Lauren Woods v. Department of Corrections (2017-158)

10. **WITHDRAWALS**

Mr. Haines moved to accept the following withdrawals *en bloc* and to dismiss the appeals. Ms. Monteiro seconded and the motion carried 5-0, with Ms. Wagers recusing.

A. Bradley L. Butcher v. Finance and Administration Cabinet (2017-189)

B. Sarah Prewitt v. Cabinet for Health and Family Services (2017-219)

C. George Styes v. Department of Parks (2017-181)

D. Debbie Talady v. Cabinet for Health and Family Services (2017-162)

E. Lowell Grubb v. Kentucky State Police (2017-035)

F. Roy D. Harber v. v. Kentucky State Police & Personnel (2016-185)

G. Jeffery Hope v. Department of Corrections (2017-190)

## 11. SETTLEMENTS

Ms. Griffith moved to issue a settlement order and to sustain the appeal to the extent set forth in the settlement as submitted by the parties. Ms. Wagers seconded and the motion carried 6-0.

A. Davona Lynn Zimmerman v. Transportation Cabinet (2017-188)

## 12. Settlement – Agreement in Anticipation of Litigation – No Appeal Filed

Ashley Kirk v. Finance and Administration Cabinet

The Hon. Cary Bishop was present to answer any of the Board's questions.

After some discussion, no action was taken by the Board.

## 13. OTHER

As to the status of the Personnel Cabinet's request for investigation of the Little Sandy Correctional Complex, Mr. Sipek stated that he would be requesting documents from the Agency. Board members Ms. Monteiro and Ms. Lawrence will be assisting with the investigation.

After discussion concerning the Attorney General's office participating as hearing officers for the Board, it was determined that the Memorandum of Agreement should include the following terms: 1) The start date should begin July 1, 2018; 2) AG hearing officers will take KRS 18A training and 3) the Board can remove AG hearing officers that do not meet the Board's approval.

There being no further business, Mr. Haines moved to adjourn. Ms. Wagers seconded and the motion passed by acclamation. (12:30 p.m.)



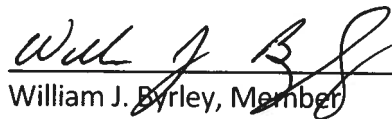
Brian J. Crall, Chair



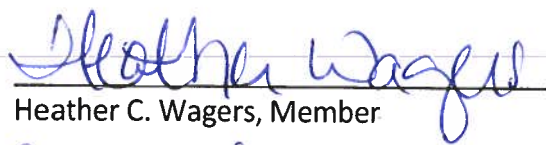
Mark O. Haines, Vice Chair

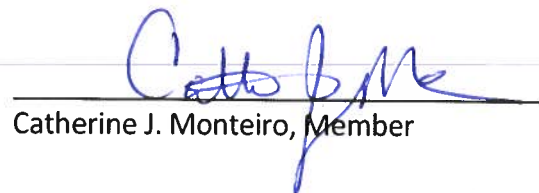


Beverly H. Griffith, Member



William J. Byrley, Member

  
Heather C. Wagers, Member

  
Catherine J. Monteiro, Member

  
Tanya R. Lawrence, Member



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-051**

**MARVIN THOMAS**

**APPELLANT**

**V.                   FINAL ORDER ALTERING THE HEARING OFFICER'S  
FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**TRANSPORTATION CABINET**

**APPELLEE**

**AND**

**FRANK KINCAID**

**INTERVENOR**

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The Board, at its regular January 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 9, 2017, Appellee's Exceptions and Request for Oral Argument, Appellant's Exceptions, oral arguments, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A.     **Delete Findings of Fact** paragraphs 22 and substitute the following:

22.     What did the interview panelists consider when they examined each candidate's Training/Work Experience Unique to Position, and interview rating, as part of a candidate's qualifications? It is clear from the testimony of each of the panelists that they gave great weight to Mr. Kincaid's experience in construction. Mr. Caudill testified there were a lot of "construction folk" in lead roles throughout his District; they handled multi-million dollar projects in construction and made decisions every day dealing with many problems; and experience in construction was very much like a "training program" for the lead jobs in District 10. Mr. Sheffel testified that the panelists engaged in a discussion of Kincaid's construction being relevant to work in Permits. Mr. Carty testified that Kincaid's work experience on construction projects was "very relevant" to the Permits Section, while also acknowledging that Mr. Thomas had been conducting relevant work to the posted position throughout his work in the Permits Section. Thus, the Board finds the interview panelists appropriately considered the Training/Work Experience Unique to the Position aspect of Qualifications.

**B. Delete Findings of Fact paragraphs 24 through 26 and substitute the following:**

24. Given testimony of the interview panelists, the experience of Mr. Thomas in the Permits Section, and the evidence that showed the performance of job duties in the Permits Section required minimal, if any, supervision, it appears the interview panelists gave significant consideration and weight to Mr. Kincaid's advantage to the qualification of supervisory experience for this vacancy. Yet, as long as the Agency considers "the five factors," the Agency has at least some discretion as to how much weight to afford each factor. The Board finds the Agency properly utilized their discretion to afford significant weight to prior supervisory experience.

25. One troubling consideration, however, is the testimony regarding the interview rating. Mr. Kincaid was rated "Excellent" on his interview. It was noted on the Selection Summary, "he answered five of five questions with work-related answers." Mr. Thomas was rated at "Very Good" and it was noted "he gave relevant answers to four of five questions."

The interview panelists were asked specifically about their recollection why Mr. Thomas was rated as having given relevant answers to four of five questions. Mr. Caudill testified that on his questionnaire for Mr. Thomas, Caudill had changed his rating on question five from "Excellent" to "Very Good," but could not recall why he did so. He also could not recall the reason for his entry that Appellant had given relevant answers to four of the five questions.

Given the time that passed between conducting the interviews and testifying about those interviews, it is understandable that some of the specific details about the promotional process might be forgotten. Nonetheless, given the importance of the interview ratings in this and every hiring/promotional process, the Agency is counseled to ensure its staff has adequate training on how to contemporaneously memorialize the decisions, impressions, and recommendations provided by its hiring panels.

26. Even given the lack of documentation explaining the promotion panel's interview ratings, the Board finds that the Agency appropriately considered "the five factors," thus meeting their procedural obligation as established by KRS 18A.0751(1)(f) and 101 KAR 1:400, Section 1(1).

**C. Delete Conclusions of Law paragraphs 10, 11, and 12, and substitute the following:**

10. Each of the panelists testified independently that when it came to considering training/work experience unique to position, they each believed past experience in a supervisory position, particularly in construction, was a very important consideration. It is worth noting that there was conflicting testimony regarding whether Mr. Kincaid had actual supervisory experience in light of his not having included indication of same on his earlier

employment applications. Further, the evidence was very clear that due to the existence of two employees in the Permits Section, one supervisor and one employee Tech III, and that for more than 16 years Mr. Thomas had been conducting the bulk of the work in the Permits Section with a minimum, if any supervision, and that Thomas apparently had performed such duties over a long period of time in a more than adequate manner. Additionally, the Agency failed to adequately explain the great weight it placed on prior construction experience, which is troubling given that the Agency also failed to adequately explain how such construction experience was relevant to the Permits Section Supervisor position challenged herein. Nonetheless, even if the Board would weigh the factors at play in this promotional process differently, compliance with the applicable statutes and regulations, including KRS 18A.0751, is all that is required. Upon review of the evidence of record, the Board concludes, as a matter of law, that the Agency gave appropriate consideration to each candidate's qualifications, record of performance, conduct and seniority in conducting the underlying promotional process. Accordingly, the Agency met their procedural obligation as established by KRS 18A.0751(1)(f) and 101 KAR 1:400, Section 1(1).

D. Delete the Recommended Order and substitute the following:

**IT IS HEREBY ORDERED** that the appeal of **MARVIN THOMAS V. TRANSPORTATION CABINET AND FRANK KINCAID, (APPEAL NO. 2017-051)** is **DISMISSED**.

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, are approved, adopted and incorporated herein by reference as a part of this Order, and Appellant's appeal is **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

**SO ORDERED** this 18<sup>th</sup> day of January, 2018.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Will Fogle  
Hon. Paul Fauri  
Frank Kincaid  
J.R. Dobner